SUPREME COURT, U.S.
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No. 09-628

In The
Supreme Court of the United States

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the U.S. Supreme Court grant certiorari or otherwise hold this case in abeyance pending the Court's decision in *Padilla v. Kentucky*, No. 08-651, *cert. granted*, 129 S.Ct. 1317 (Feb. 23, 2009), *oral argument held* Oct. 13, 2009, which raises an issue substantially identical to that presented here, i.e., if a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Supreme Court of Florida:

Richard Vezina was the Petitioner below and is the Petitioner in this action. The State of Florida was the Respondent below and is the Respondent in this action.

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OPINIONS BELOW

The opinion of the Florida Supreme Court is not reported. It is reprinted in the Appendix. App. 1. The opinion of the Florida District Court of Appeal is not reported and is attached to the Appendix. App. 2. The order of the Circuit Court denying rehearing was not reported and is reprinted in the Appendix. App. 3-4. The order of the Circuit Court denying the motion to vacate the plea and sentence was not reported and is reprinted in the Appendix. App. 5-6.

JURISDICTION

Title 28 of the U.S. Code, section 1257(a) gives this Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." Florida's highest court has been presented with the issue in this case and rendered a decision on August 26, 2009. App. 1. This petition is timely filed on or before November 24, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Section One of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Richard Vezina is a citizen of Canada who has lived in the United States for more than 23 years. On April 27, 1996, he married Melanee Knehr, a U.S. citizen. On January 17, 1997, he applied for adjustment of status to acquire lawful permanent residence of the United States on the basis of his marriage to a U.S. citizen. Immigration authorities granted his family-based visa petition. App. 39.

On September 14, 1997, Petitioner was arrested in Osceola County, Florida, for misdemeanor assault. *See* App. 13. The police also found a small amount of

cocaine in his possession. On February 20, 1998, he entered a nolo contendere plea to a charge of possession of cocaine, in violation of Florida Statutes section 893.13(6)(a), and the assault charge was dismissed. App. 11. On the same date, Petitioner was sentenced to 18 months probation, without any sentence to incarceration. App. 43, 47. On September 28, 2000, the immigration authorities denied his application for lawful permanent resident status on account of this controlled substances conviction. App. 40.

Prior to entry of the plea, Petitioner informed defense counsel of his immigration status. Defense counsel undertook to advise Petitioner of the immigration consequences of the plea, but erroneously informed him that a plea of nolo contendere to possession of cocaine would not cause any adverse immigration consequences. App. 31. Petitioner entered his plea in reliance on this mistaken legal advice. If he had known that this conviction would entirely disqualify him from eligibility for lawful permanent residence, and force the immigration authorities to deny his application for adjustment of status, he would have sought a nondeportable alternative disposition, such as entry of a plea to the assault charge, with dismissal of the controlled substances offense. Assault does not trigger adverse immigration consequences unless a one-year sentence to incarceration is imposed. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

On October 23, 2008, Petitioner filed a Motion to Set Aside Plea and Vacate Sentence in the Circuit Court of the Ninth Judicial Circuit in Osceola County, Florida. The motion was made on grounds, *inter alia*, that defense counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution, by affirmatively misadvising Petitioner of the immigration consequences of the plea. App. 31. On December 17, 2008, the court denied the motion without opinion. App. 5.

On December 29, 2008, Petitioner filed a Motion for Rehearing. App. 29-42. The motion expressly argued the federal constitutional claim that the "affirmative misadvice of counsel" constituted ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution:

> The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences — if it is incorrect — can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits. (Footnote and citation omitted.) The prevailing federal rule which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel

> in giving affirmative misadvice concerning the immigration consequences of the plea, so long as the error is prejudicial. (Footnotes omitted.)

App. 33-34.

Petitioner supported his motion for rehearing with an affidavit by immigration lawyer Ira Kurzban, outlining Petitioner's immigration status and explaining the severe immigration damage inflicted on Petitioner by the plea in this case. App. 39-42. This conviction forced the immigration authorities to deny Petitioner's application for lawful permanent residence, which they did on September 28, 2000. App. 40; INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). No waiver of inadmissibility was or is available by which Petitioner could avoid inadmissiblity on account of this conviction. *See* INA § 212(h), 8 U.S.C. § 1182(h). This conviction also rendered him deportable. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). He was not and is not eligible for a waiver of deportability. INA § 212(c), 8 U.S.C. § 1182(c) (former law); INA § 240A(a), 8 U.S.C. § 1229b(a) (current law). On February 4, 2009, the court denied Petitioner's Motion for Rehearing without opinion. App. 3.

Petitioner appealed from the denial of these motions to the Fifth District Court of Appeal, which affirmed the lower court's rulings *per curiam* and without opinion on June 23, 2009. App. 2.

On August 12, 2009, Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court, on the grounds that the decision of the district court of appeals expressly ruled on a federal constitutional claim. App. 25. On August 20, 2009, Petitioner filed a petition in the Florida Supreme Court. App. 7. The issue presented was whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of the plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment, and renders legally invalid the guilty plea which was induced by that faulty advice. App. 15.

On August 26, 2009, the Florida Supreme Court entered an order dismissing the Petition for Review, and indicating that no motion for rehearing would be entertained. App. 1.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI OR OTHERWISE HOLD THIS CASE IN ABEYANCE PENDING ITS DECISION IN *PADILLA v. KENTUCKY*, No. 08-651, WHICH RAISES ISSUES SUBSTANTIALLY IDENTICAL TO THOSE RAISED HEREIN.

The outcome of this case will be governed by this Court's decision in *Padilla v. Kentucky*, No. 08-651, *cert. granted*, 129 S.Ct. 1317 (Feb. 23, 2009), *oral argument held* Oct. 13, 2009, because the two cases present substantially identical issues. Accordingly, we respectfully request that the Court hold this petition in abeyance pending the Court's decision in *Padilla v. Kentucky*.

In *Padilla v. Kentucky*, the Court was presented with a factual and legal scenario nearly identical to that presented in the instant petition. In that case, the noncitizen Petitioner pleaded guilty to a state felony charge of marijuana drug trafficking. He did so on the erroneous advice of defense counsel that he need not worry about deportation because he had been in United States for a long enough period of time. The trafficking conviction, however, is considered an "aggravated felony" under federal law and subjected Padilla to mandatory immigration detention and deportation without the possibility of discretionary review by an immigration judge.

Despite defense counsel's erroneous advice, the Kentucky Supreme Court denied Padilla's motion to vacate his plea on the grounds of ineffective assistance of counsel. It held that advice on the "collateral consequence" of deportation is outside the scope of the Sixth Amendment guarantee and that neither counsel's failure to advise nor even counsel's affirmative misadvice about such consequences can give rise to a claim of ineffective assistance of counsel.

This Court granted Padilla's petition for a writ of certiorari, and will decide the following issues:

> (1) In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have a duty to investigate and advise a non-citizen client whether the offense to which he is pleading guilty will result in his deportation?
>
> (2) If a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

Brief of Petitioner at i, *Padilla v. Kentucky*, No. 08-651. These issues were argued before the Court on October 13, 2009.

The issues presented in *Padilla v. Kentucky* are substantially identical to those presented in the instant petition. Here, Petitioner Richard Vezina is a citizen of Canada, who has lived in the United States for more than 23 years. On April 27, 1996, he married

Melanee Knehr, a U.S. citizen. On January 17, 1997, he applied for adjustment of status to acquire lawful permanent residence of the United States on the basis of his marriage to a U.S. citizen. Immigration authorities then granted his family-based visa petition.

On September 14, 1997, he was arrested in Osceola County, Florida, for misdemeanor assault, and police found a small amount of cocaine in his possession.

Prior to entry of the plea, Petitioner's defense counsel was aware of Petitioner's immigration status but erroneously informed him that the plea of nolo contendere to possession of cocaine would not cause any adverse immigration consequences. In reliance on this mistaken legal advice, on February 20, 1998, Petitioner entered a nolo contendere plea to a charge of possession of cocaine in violation of Florida Statute section 893.13(6)(a). The assault charge was dismissed.

Contrary to defense counsel's advice, in actuality this conviction had severe, damaging, and permanent immigration consequences. It forced the immigration authorities to deny Petitioner's application for lawful permanent residence, which they did on September 28, 2000. No waiver of inadmissibility exists when a noncitizen has been convicted of such an offense. INA § 212(h), 8 U.S.C. § 1182(h). This conviction also rendered Petitioner deportable and precluded immigration authorities from issuing a waiver of deportability. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i);

INA § 212(c), 8 U.S.C. § 1182(c) (former law); INA § 240A(a), 8 U.S.C. § 1229b(a) (current law).

Upon discovery of the severe immigration consequences of his plea, Petitioner sought post-conviction relief in the Florida state courts, contending that defense counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment, by affirmatively misadvising Petitioner concerning the immigration consequences of the plea. The Florida Circuit Court, District Court of Appeal, and Supreme Court denied relief. App. 5, 3, 2, 1.

Like Padilla, Petitioner seeks review by this Court to determine whether a criminal defense attorney's affirmative misadvice that a noncitizen defendant's plea will not result in adverse immigration consequences can constitute ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution.

This Court's resolution of *Padilla* may demonstrate that the Florida courts wrongly denied Petitioner's post-conviction motion to set aside his plea. For this reason, we respectfully request that the Court either grant certiorari and schedule briefing and oral argument, or hold its decision in abeyance pending resolution of *Padilla v. Kentucky*, and thereafter grant certiorari and remand the case to the Florida Supreme Court for reconsideration in light of its decision in *Padilla*.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to issue a writ of certiorari and schedule briefing and oral argument, or hold its decision in abeyance pending the resolution of *Padilla v. Kentucky*, and thereafter grant certiorari and remand this case to the Florida Supreme Court for reconsideration in light of its decision in *Padilla*.

Respectfully submitted,

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Supreme Court of Florida

WEDNESDAY, AUGUST 26, 2009

CASE NO.: SC09-1537
Lower Tribunal No(s).: SD09-859, 49-97-CF-1899

RICHARD VEZINA vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

jn
Served:

HON. SUSAN WRIGHT, CLERK
CHRISTOPHER L. SMITH
HON. BILL MCCOLLUM
HON. SCOTT DAVID POLODNA, JUDGE
HON. MALCOM THOMPSON, CLERK

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2009

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

RICHARD VEZINA,

Appellant,

v.

CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee.

/

Decision filed June 23, 2009

3.850 Appeal from the Circuit Court for Osceola County, Scott Polodna, Judge.

Christopher L. Smith, Orlando, for Appellant.

No Appearance for Appellee.

PER CURIAM.

AFFIRMED.

PALMER, C.J., LAWSON and EVANDER, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

FELONY DIVISION 201
CASE NO.: CR97-1899

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD VEZINA,

Defendant. /

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before the Court on this day, upon the Motion for Rehearing which was filed December 29, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 4th day of February, 2009.

/s/ Scott Polodna
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 5th day of February, 2009.

/s/ [Illegible]
Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

FELONY DIVISION 201
CASE NO.: CR97-1899

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD VEZINA,

Defendant. /

ORDER DENYING MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

THIS CAUSE having come before the Court on this day, upon the Motion to Set Aside Plea and Vacate Sentence which was filed October 23, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 16th day of December, 2008.

/s/ Scott Polodna
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 17th day of December, 2008.

/s/ [Illegible]
Judicial Assistant

App. 7

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

RICHARD VEZINA, Petitioner,

v.

STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI

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August 20, 2009

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PETITION FOR WRIT OF CERTIORARI

Richard Vezina respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the Fifth District affirming the denial of Petitioner's Motions to Set Aside Plea and Rehearing by the Trial Court below.

BASIS FOR INVOKING JURISDICTION

Comes now Petitioner, **RICHARD VEZINA,** and pursuant to Article V, Section 3(b)(3), Florida Constitution, Fla. R. App. P. 9.100 and 9.030(a)(2)1A ii and the Sixth and Fourteenth Amendments to the United States Constitution, files this petition seeking review by this Court's certiorari jurisdiction in that the lower court affirmed an Order of he trial court denying the Petitioner's Motion for Post Conviction Relief and Rehearing without holding an evidentiary hearing.

FACTS UPON WHICH PETITIONER RELIES

This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

On February 20, 1998, the Petitioner entered a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant successfully completed his probationary sentence.

When the Petitioner entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A transcript of the plea demonstrated that the trial judge made a fleeting reference to immigration consequences but did not fully inform the Petitioner to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction.

The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Petitioner's attorney informed him that this Plea would not result in any immigration consequences.

The Petitioner has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Petitioner learned that he could be subject to deportation

In September, 2007, the Petitioner met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Petitioner "obtained knowledge" of the consequences.

This situation involved affirmative misadvice by the Petitioner's counsel, thus it is not subject to a *Strickland* standard for review.

The Petitioner is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United. States.

In order to obtain lawful permanent resident status, the Petitioner needs to vacate the 1998 conviction for possession of cocaine.

The Petitioner was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Petitioner's counsel, Steven Jablon, Esq., who made the court appearance for the plea was aware the Petitioner was not a U. S. Citizen. The Petitioner specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

The Petitioner would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Petitioner could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008. Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008. On or about December 10, 2008, the State filed

a Response to Defendant's Motion for Post Conviction Relief. On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed. Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing. Nor, was there any explanation as to why a hearing had been scheduled but was no longer to be held.

The response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

The Petitioner filed a timely Motion for Rehearing. The trial court below denied the Motion for Rehearing and the Petitioner filed a timely Notice of Appeal on February 26, 2009. On June 23, 2009, the Fifth District Court of Appeal returned a Per Curiam Affirmed opinion which was rendered on July 15, 2009.

ISSUE

Whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of a plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, as applied to the statues [sic] by the Fourteenth Amendment, rendering the guilty plea which was induced by that faulty advice legally invalid?

ARGUMENT

The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the *Strickland* standard and the only determination for the Court is to see if, in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Petitioner received affirmative misadvice from his attorney and as such, Petitioner is entitled to an Evidentiary Hearing on that issue alone. *Rensoli v. State*, 718 So.2d 1278 (3rd DCA 1998).

The Petitioner sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in

Petitioner's Motion to Set Aside Plea and Vacate Sentence. The consequences are further substantiated by an Affidavit from an expert witness detailing how the Plea affected the Petitioner's immigration status here in the United States.

It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Petitioner in any manner entitles him to relief in this cause. *Benelhocine v. State*, 787 So.2d 38 (2nd DCA 2001). Further, the Petitioner is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. *Ghanavati v. State*, 820 So.2d 989 (4th DCA 2002).

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject in danger of deportation, competent defense counsel will look into

it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration consequences of this particular plea. If they are damaging, defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably – based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert – advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences – if it is incorrect – can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1]

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[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §6.18 (2004)

The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz*, 25 Cal.4th 230, 240-242; 19 P.3d 1171, 1177-1179 (2001).

The State argued that a statement during the plea proceedings that no other promises have been

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[2] *United States* v. *Couto*, 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* [sic] v. *United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Holmes* v. *United States*, 876 F.2d 1545 (11th Cir. 1989); *Ostrander* v. *Green*, 46 F.3d 347,355 (4th Cir. 1995), *overruled on other grounds, O'Dell* v. *Netherland*, 95 F.3d 214,1222-23 (4th Cir. 1996); *Bowers* v. *Saffle*, 216 F.3d 918, 925-26 (10th Cif. [sic] 2000); *Goodall v. United States*, 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill* v. *Lockhart*, 894 F.2d 1009 (8th cir. 1999), *cert. denied*, 497 U.S. 1011 (1999).

[3] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz*, 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).

made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. This is not true. The language concerning promises always refers to direct penal consequences in. criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argued that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State asserted that the main purpose of the rule is to tell the defendant the potential for deportation. This is correct. Once so informed, the defendant and defense counsel – as indicated above – will see whether the danger applies to the specific

defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case.

The State argued the motion was legally insufficient under *Green*. The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claimed that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice – if counsel gives such, advice at all – is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred – as Mr. Vezina is barred – from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status,

after which he will be removed from the country for lack of legal status. "Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain to occur. This was proven in the evidence submitted in support of the Motion.

There can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." *United States v. Couto*, 311 F.3d at 187 (2bd Cir. 2002). The overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . ." *Zerbst*, 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. *Nixon*, 543 U.S. at 187. "[I]ntellingent assessment of he relative advantages of pleading guilty is frequently impossible without the assistance of any attorney," *Brady*, 397 U.S. at

749 n.6., including an independent examination of the law as applied to the facts. *Von Moltke*, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of the representations defense counsel makes regarding the law and its applications, for typically the defendant lacks the wherewithal to question them.

Deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. *St. Cyr*, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights, The Ninth Circuit so concluded in *Kwan*, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* At 1016 (citing Model Rules of Prof'l Conduct R. 1.1[6]).

False representations that the attorney freely makes on legal mattes [sic] distort the defendant's decision to plead guilty. It is common to draw a line

in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts* § 552 (1965). On the same principle, if a lawyer supples false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule . . . would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." *Mott v. State*, 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advise or representation of his attorney, which, advice or representations demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary[.]" *People v. Correa*, 485 N.E.2d at 310; *accord Strader*, 611 F.2d at 65. *See also Evitts v. Lucey*, 469 U.S. 387 (1985) (State has not obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

See Santobello v. New York, 404 U.S. 257, 262 (1971). In *Brady*, the Court recognized that

misrepresentation by the court, the prosecutor, or his own counsel that induces a plea materially invalidates it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

CONCLUSION

Affirmative misadvice by counsel as to the immigration consequences of the entry of a plea violates the Sixth and Fourteenth Amendments of the United States Constitution. Where evidence of said misadvice is uncontroverted, an evidentiary hearing should be held.

This Court should vacate the ruling of the Fifth District Court of Appeal and Trial Court and remand this matter for an evidentiary hearing.

Respectfully submitted,

/s/ Christopher L. Smith
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COUNSEL FOR PETITIONER

[Certificate Of Service And Certificate Of Compliance Omitted In Printing]

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

RICHARD VEZINA,

Appellant/Petitioner,

v. CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee/Respondent. /

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that RICHARD VEZINA, Appellant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the Fifth District Court of Appeal rendered on July 15, 2009. The basis for jurisdiction is that the opinion of the Fifth District Court of Appeal expressly construes a provision of the federal constitution.

[Certificate Of Service Omitted In Printing]

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/s/ Christopher L. Smith
CHRISTOPHER L. SMITH
Florida Bar No. 367461
Attorney for Appellant/Petitioner

RICHARD VEZINA

v.

STATE OF FLORIDA

5D09-859

Mandate was forwarded to trial court today.
Clerk, Fifth District Court of Appeal,
Daytona Beach

JUL 17 2009 JUL 15 2009

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 79-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant. /

NOTICE OF APPEAL

NOTICE is hereby given that the Defendant, **RICHARD VEZINA**, appeals to the Fifth District Court of Appeal, State of Florida, the trial Court's denial of Defendant's Motion to Set Aside Plea and Vacate Sentence and the Court's denial of Defendant's Motion for Rehearing.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by Facsimile/ Hand-Delivery/U. S. Mail to the Office of the State Attorney, No. 2 Courthouse Square, Suite 3500, Kissimmee, FL, 34741, the Office of the Attorney General Fifth District, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118; and to the

Defendant, Richard Vezina, 1014 Southeast 12th Avenue, Deerfield Beach, FL 32441 on this 26 day of February, 2009.

/s/ Christopher L. Smith
CHRISTOPHER L. SMITH, ESQ.
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FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 79-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant. /

DEFENDANT'S MOTION FOR REHEARING

COMES NOW the Defendant, **RICHARD VEZINA,** by and through his undersigned attorney, and pursuant to Rule 3.850(g), FRCrP, moves this Honorable Court to grant a Rehearing on the Motion to Set Aside Plea and Vacate Sentence in this cause and as grounds therefore would show:

1. This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

2. (a) The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22. 2008.

(b) Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008.

(c) On or about December 10. 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief.

(d) On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed.

(e) Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing.

3. That response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

4. The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the *Strickland* standard and the only determination for the Court is to see if, in fact, affirmative misadvice

occurred. The State does not allege any matters within their response which denies that the Defendant received affirmative misadvice from his attorney and as such, is entitled to an Evidentiary Hearing on that issue alone. *Rensoli v. State,* 718 So.2d 1278 (3rd DCA 1998).

5. The Defendant sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in Defendant's Motion to Set Aside Plea and Vacate Sentence. This is further substantiated by the Affidavit from an expert witness detailing how the Plea affected the Defendant's immigration status here in the United States. A copy of said Affidavit is attached hereto and incorporated herein for all purposes as Exhibit "A".

6. It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Defendant in any manner entitles him to relief in this cause, *Benelhocine v. State,* 787 So.2d 38 (2nd DCA 2001). Further, the Defendant is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. *Ghanavati v. State,* 820 So.2d 989 (4th DCA 2002).

MEMORANDUM OF LAW

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. (Response 2.) The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject to danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration consequences of this particular plea. If they are damaging defense counsel, and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably – based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert – advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion,

supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all, defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences – if it is incorrect – can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] See N. Tooby & 1. [sic] ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 11.70(D). The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from

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[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §6.18 (2004)

[2] *United States v. Couta*, 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvils-Morgan* [sic] *v. United States*, 765 F.2d 1534, 1541 (11th Cir 1985); *Holms v. United States*, 876 F.2d 1545 (11th Cir. 1989); *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 214, 1222-23 (4th Cir. 1996); *Bowers v. Saffle*, 216 F.3d 918, 925-26 (10th Cir. 2000); *Goodall v. United States*, 759 A.2d 1077, 1082 (D.C. App. 2000); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1999), *cert. denied*, 497 U.S. 1011 (1999).

ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz,* 25 Cal.4th 230, 240-242; 19 P.3d 1171, 1177-1179 (2001).

The State argues that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences, (Response 3.) This is not true. The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

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[3] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz,* 25 Cal.4th 250 (2001) (reviewing federal authorities on this point, and applying them in a state case).

The State argues that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. (Response 3.) This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State says the main purpose of the rule is to tell the defendant the potential for deportation. (Response 3.) This is correct. Once so informed, the defendant and defense counsel – as indicated above – will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case. See point 1, above.

The State argues the motion is legally insufficient under Green. (Response 3-4.) The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claims that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the

deadline. (Response 4.) The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice – if counsel gives such advice at all – is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred – as Mr. Vezina is barred – from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur. This was proven in the evidence submitted in support of the Motion.

WHEREFORE, the Defendant prays this Honorable Court grant a Re-Hearing on this matter and set an Evidentiary Hearing to determine the validity of the Motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile/

Hand-Delivery/U. S. Mail to Wilson Green, Esq., Assistant State Attorney, P. O. Box 1673, Orlando, FL 32802-1672, this 23rd day of December 2008.

/s/ Christopher L. Smith
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FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

AFFIDAVIT

STATE OF FLORIDA)
)
CITY OF MIAMI)

BEFORE ME the undersigned authority appeared IRA J. KURZBAN who after being duly sworn deposes and says:

1. My name is Ira J. Kurzban and I am a partner at Kurzban, Kurzban, Weinger & Tetzeli, P.A.

Biography

I received my J.D. and M.A. degrees from the University of California at Berkeley. I am also the past-President and former General Counsel of the

American Immigration Lawyers Association ("AILA"). I have been named by the National Law Journal as one of the top twenty immigration lawyers in the United States and was named in the Best Lawyers in America for my work in immigration and labor law. I am also the first recipient of the Tobias Simon *Pro Bono* Award presented by the Chief Justice of the Florida Supreme Court, the Lawyers of the Americas Award for my work on behalf of human rights in this hemisphere given by the University of Miami, the Jack Wasserman Award for excellence in federal litigation, the Edith Lowenstein Memorial Award for excellence in the advancement of immigration law given by the American Immigration Lawyers Association ("AILA"), and the Carol King Award for my efforts in immigration law given by the National Lawyers Guild. I am also Florida Bar Board Certified in Immigration and Nationality Law and have received an AV Peer Review Rating by Martindale-Hubbell for excellence in practicing law. In addition, I have litigated over fifty federal cases concerning the rights of aliens, including *Jean v. Nelson*, *Commissioner v. Jean*, and *McNary v. Haitian Refugee Center, Inc.*, which I argued before the United States Supreme Court. I have been granted an honorary degree by the University of Pennsylvania School of Law and I am the recipient of the Wasserstein Fellowship by Harvard University School of Law. I am also an adjunct faculty member in Immigration and Nationality Law at the University of Miami School of Law and Nova University School of Law and have lectured

and published extensively in the field of immigration law, including articles in the Harvard Law Review and San Diego Law Review. In addition, I am the author of the most widely used one volume treatise in Immigration and Nationality Law, titled "*Kurzban's Immigration Law Sourcebook*." I have rendered expert opinions and been recognized as an expert in Immigration and Nationality Law in cases in both state and federal courts.

Immigration Consequences of Mr. Vezina's Criminal Convictions

2. Richard Vezina ("Mr. Vezina") is a citizen and national of Canada. He married Malanee [sic] Knehr, a United States citizen, on or about April 27, 1996, in Dania, Florida.

3. On February 20, 1998, Mr. Vezina entered a Plea and was sentenced to probation for the offense of possession of Cocaine, in violation of Florida Statute Section 893.13, in the Circuit Court of the Ninth Judicial Circuit in and for the Osceola County, Florida (Case No.: 49-97-CF-1899).

4. Mr. Vezina applied for adjustment of status to acquire lawful permanent residence of the United States on January 17, 1997. Mr. Vezina applied for adjustment of status based on his marriage to a United States citizen, Melanee Vezina (formerly Melanee Knehr). He is the beneficiary of an approved family-based visa petition filed by his United States citizen

spouse, which allowed him to seek adjustment of status to that of a lawful permanent resident of the United States.

5. Mr. Vezina's adjustment of status application was denied by Citizenship and Immigration Service ("CIS"), formerly legacy Immigration and Naturalization Service ("INS"), because of his cocaine conviction. The adjustment of status application was denied pursuant to the Immigration and nationality Act ("INA") Section 212(a)(2)(A)(i)(II) (controlled substance violations). The adjustment of status application was solely denied based on Mr. Vezina's cocaine conviction. There were no other grounds used by CIS to deny Mr. Vezina's adjustment of status application.

6. Mr. Vezina's 1998 guilty plea to the charge of possession of cocaine clearly and unequivocally subjects him to deportation, exclusion, and/or removal from the United States.

7. Based on the possession of cocaine conviction, Mr. Vezina is currently removable pursuant to INA §237(a)(2)(B)(i) (controlled substances), 8 USC §1227(a)(2)(B). In addition, at this time, if Mr. Vezina travels outside of the United States, or if he seeks to acquire lawful permanent residence of the United States he is also removable and excludable under INA §212(A)(2)(a)(i)(II), 8 USC §1227(a)(2)(A)(i)(II)

(controlled substances.)[1] These sections of law are broadly construed to include any state conviction for controlled substances or drug related crimes.

Mr. Vezina Can Show He Has Been Prejudiced Based on His Guilty Plea To Cocaine Trafficking

8. In the instant case, therefore, it is clear that Mr. Vezina has been prejudiced by his conviction in 1998, in the State of Florida, to possession of cocaine. The following facts clearly demonstrate Mr. Vezina's prejudice, which result from his guilty plea: (A) the Immigration and Nationality Act (INA) makes Mr. Vezina statutorily removable and/or inadmissible because of his possession of cocaine conviction; (B) he is subject to deportation and removal because he is removable or deportable under INA §§237(a)(2)(B)(i) (controlled substance violator), 8 USC §1227(a)(2)(A)(B)(i); (C) he is permanently inadmissible and subject to removal from the United States if he attempts to renter the United States after travelling abroad, or seeks adjustment of status, under the INA §212(a)(2)(A)(i)(II), 8 USC §1182(a)(2)(A)(i)(II), because he has been convicted of a crime relating to a controlled substance violation; and (D) his conviction was the

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[1] If Mr. Vezina travels outside of the United States, and seeks to return, he can also be detained without bond and be removed solely because of his criminal conviction.

sole basis for the legacy INS to deny his adjustment of status application.

9. Solely as a result of Mr. Vezina's convictions, therefore, he is subject to deportation, inadmissibility, and removal from the United States without the possibility to apply for any relief. Mr. Vezina is removable from the United States, and will be permanently barred from reentering the United States, solely based on his possession of cocaine conviction, which is a clear and unequivocal showing of prejudice. Absent relief from this Court, Mr. Vezina will be removed or deported from the United States, prevented from obtaining lawful permanent residence, and permanently barred from reentering the United States.

FURTHER AFFIANT SAYETH NOT

/s/ Ira J. Kurzban
Ira J. Kurzban, Esq.

Sworn and subscribed before me this 9th day of December, 2008.

/s/ Zarayda N. Heathercote
NOTARY PUBLIC

[SEAL] MY PUBLIC STATE OF NOTARY
Zarayda N. Heathercote
Commission # DD680528
Expires: JULY 21, 2011
Bonded Thru Atlantic Bonding Co., Inc.

IN THE CIRCUIT COURT
FOR OSCEOLA COUNTY,
FLORIDA
CRIMINAL DIVISION

CASE NUMBER CR 97-1899B

STATE OF FLORIDA

– vs. –

RICHARD JOSEPH VEZINA

PLEA

1. I, the above-named defendant, hereby withdraw my plea(s) of Not Guilty, and enter the following plea(s) of ( ) Guilty (✓) Nolo Contendere to Possession of cocaine a 3rd degree felony/misdemeanor with a maximum penalty of 5 years ( ) Guilty (✓) Nolo Contendere to _____ a ___ degree felony/misdemeanor with a maximum penalty of _____

2. I understand the following paragraphs concerning my trial rights:

a. that if the Court accepts my plea(s), I give up my right to a trial, at which I would have had the following rights:

(i) to have a jury determine whether I am guilty or not guilty;

(ii) to see and hear the witnesses testify, and to have my lawyer question them for me;

(iii) to subpoena & present witnesses & items of evidence in my defense, & to present any defense I might have to the jury;

(iv) to testify or to remain silent; and

(v) to require the prosecutor to prove my guilty by admissible evidence beyond any reasonable doubt before I can be found guilty by the jury.

b. that I give up my right to appeal all matters except the legality of my sentence or the Court's authority to hear this case. My lawyer has explained to me what an appeal is.

c. that a plea of Not Guilty denies that I committed the crime(s); & Plea of Guilty admits that I did commit the crime(s); and a Plea of Nolo Contendere (No Contest) says that I do not contest the evidence against me. I understand that if the Court accepts my plea(s) there will be NO TRIAL and the Court will impose sentence(s) based upon my plea(s).

d. that I have read the information/ indictment on this case and I understand the charge(s) to which I enter my plea(s). My lawyer has explained to me the maximum penalty for the charge(s), the essential elements of the crime(s) and possible defenses to the crime(s), and I understand these things. I understand that I am on parole, my parole can be revoked and I can returned to prison to complete that sentence; and if I am on probation on another case my probation can be revoked and I can receive a separate

sentence up to the maximum on the probation charge in addition to the sentence imposed on this case.

3. Neither my lawyer nor anyone else has told me or promised me that the Judge would give me a particular sentence, nor has my lawyer or anyone else told me or promised me anything to get me to enter my plea(s) except as set forth below or said in open Court:

a. ( ) No promises have been made by my lawyer or anyone else.

b. ( ) The prosecutor has agreed to 18 months drug offender probation. Fine not to exceed 500.00 & costs, adjudification [sic] up to judge.

c. ( ) The Judge has agreed to _____ sentence will be determined based on certain factors. The Judge can go above this presumptive sentence and impose up to the maximum for each count as listed above by stating clear and convincing reasons. If the Judge goes above this presumptive sentence, I will have the right to appeal my sentence. I also understand that if my plea is to a misdemeanor, that the Sentencing Guidelines do not apply and that the Judge can sentence me up to the maximum for each misdemeanor count listed above.

5. I understand that if the Judge places me on probation at my sentencing, and at a later time, the probation is revoked by the Judge (after a violation of probation hearing or my admission to the violations),

the Judge can then sentence me to the maximum penalty for the charge(s) listed above.

6. I understand and agree that if the Judge permits me to stay out of jail pending sentencing I must notify my lawyer and bondsman or pre-trial release officer of any change in my address or phone number, and if the Judge orders a Pre-Sentence Investigation (PSI) and I willfully fail to appear for an appointment with the probation officer for the PSI interview, the Judge can place me in jail for the PSI interview, or until my sentencing.

7. My education consists of 3 years college. I am not under the influence of any drug, medication or alcohol at the time I sign this plea. I am not suffering from any mental problems at this time which affect my understanding of this plea.

8. Neither my lawyer nor anyone else has pressured or forced me to enter my plea and I am entering my plea voluntarily of my own free will and because

( ) I believe that I am guilty

(✓) I believe it is in my own best interest.

9. I have read every word in this written plea. I have discussed this written plea with my lawyer and I fully understand everything contained in it. I have discussed the maximum penalties for my plea, the sentencing guidelines and I fully understand them. I have told my lawyer everything I know about this case and these charges. I am fully satisfied with the

way my lawyer has handled my case for me and have no complaints.

SWORN TO AND FILED in Open Court in the presence of defense counsel and the Judge this 20th day of February, 1998.

Mel Wills, Jr., Clerk of Courts

By: _____
Deputy Clerk in Attendance

Defendant's Signature: Richard Vezina

Address & Phone: 1014 S.E. 12th Ave.
Deerfield Beach Fla. 33441 (954) 480-8215

CERTIFICATE OF DEFENSE COUNSEL

I, Defendant's Counsel of Record, certify that: I have discussed this case with the defendant, including his/her trial rights, the nature of the charge(s), essential elements of each, the evidence against him/her of which I am aware, the possible defenses he/she has, the maximum penalty for the charge(s) the sentencing guidelines, and his/her right to appeal. No promises have been made to the defendant other than as set forth in this form or on the record. I believe he/she full understands this written plea, the consequences of entering it, and that the defendant does so of his/her own free will.

Counsel for the Defendant: /s/ Steven Jablon

CERTIFICATE OF PROSECUTOR

( ) I consent to the plea(s) to the lesser charge(s).

( ) I confirm the promises in 3(b) have been made.

Assistant State Attorney: /s/ Helen Heim

IN THE CIRCUIT COURT OF
OSCEOLA COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA	INFORMATION # C97-1899B
VS.	*FASTRACK CMP*
RICHARD JOSEPH VEZINA	1. POSSESSION OF COCAINE (F3-L3)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, OR LAWSON LAMAR, State Attorney for the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that RICHARD JOSEPH VEZINA, on the 14th day of September, 1997, in said County and State, did, in violation of Florida Statute 893.13(6)(a), actually or constructively possess Cocaine, a substance controlled by Florida Statute 893.03(2)(a)(4).

This information encompasses the transaction and all charges listed on Complaint Number CR97-1899 and the bond thereon is hereby superseded. The Osceola County Sheriff's Office shall substitute the charge(s) and bond indicated on the information for those on the above cited complaint.

By /s/ E A Cranford
Evelyn Cranford
Designated Assistant State
Attorney
Florida Bar No. 797553
Bond $1,000.00 EC/EC
S.T. 03/0798

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me Evelyn Cranford Assistant State Attorney of the Ninth Judicial Circuit of Florida, who being first duly sworn, says that he/she has received testimony under oath from the material witness or witnesses, which if true, would constitute the offense herein, and that he/she institutes this prosecution in good faith.

The foregoing instrument was acknowledged before me this 23 day of September, 1997 by the aforementioned Assistant State Attorney who is personally known to me and who did take said oath.

/s/ Carolyn A. Irving

[SEAL]

CAROLYN A. IRVING
MY COMMISSION
CC 404394
EXPIRES: September 7, 1998
Bonded Thru Notary Public
Underwriters